Supreme Court, U.S.
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No. 04-805

IN THE

Supreme Court of the United States

TEXACO, INC.,

Petitioner,

v.

FOUAD N. DAGHER, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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AMENDED CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner Texaco Inc. states that, as of May 9, 2005, its ultimate parent company changed its name from ChevronTexaco Corporation to Chevron Corporation. Chevron Corporation has no parent company, and no publicly held company owns 10% or more of Chevron Corporation's stock.

SUPPLEMENTAL BRIEF FOR PETITIONER

Respondents' supplemental brief repeats the same erroneous arguments from their brief in opposition. They assert that, for a joint venture to avoid *per se* condemnation for pricing its own product, it must prove that its *particular* prices were "necessary" or "integral" to the venture's success. That is what respondents mean when they say that it was not shown below that the "pricing restraint" at issue was "integral" to the venture. Supp. Br. 2. They are not referring to the need to set *some* price for the product—they do not deny that it was necessary for the joint venture to price its products. Rather, their argument, and the Ninth Circuit's holding, is that to avoid *per se* liability defendants had to prove that it was necessary for the venture to charge the "*same price* for the Shell and Texaco brands." *Id.* at 1 (emphasis added).

For the reasons stated in our earlier briefs, and confirmed by the United States, certiorari should be granted to review the Ninth Circuit's ruling. This Court and the courts of appeals have held that the *per se* rule does not apply where the venture needed to set some price, without requiring justification of the particular price chosen by the venture. It is the necessity of setting some price—rather than any necessity of choosing one price over another—that suffices to take cases such as this out of the *per se* rule. As the United States recognizes, the Ninth Circuit's "error is serious, it upsets the previously settled understanding of the scope of per se liability and the lawful operation of joint ventures, and it warrants this Court's review and correction." U.S. Br. 7.

Respondents assert that this Court has required a showing of "procompetitive benefits." Supp. Br. 3. But the cases respondents cite did not apply the *per se* rule that respondents seek here but the rule of reason that respondents have

expressly disclaimed.[1] And none of the cases required as a prerequisite to rule-of-reason treatment the kind of showing of necessity that the Ninth Circuit demanded here. In *BMI*, the Court did not ask whether the defendants' particular pricing scheme was necessary, but rather whether it was necessary to set any price at all for the joint license. *Broad. Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 23 (1979). Similarly, the Court rejected the *per se* rule in *NCAA* not because the NCAA proved that the particular output limitation there was "necessary" (in fact, the Court found it to be unnecessary), but because "some degree of cooperation is necessary" for the NCAA to provide its product. *NCAA v. Bd. of Regents*, 468 U.S. 85, 117 (1984).[2]

That standard of necessity was indisputably met here. "There is no basis for serious suggestion in this case that the formation of Equilon was a mere sham designed to mask cartel conduct," and "both courts below agreed that Equilon was an efficiency-enhancing venture." U.S. Br. 10. As a legitimate business formed to produce and sell its own

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[1] *Broad. Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979) (applying rule of reason to setting the price of a joint license); *NCAA v. Bd. of Regents*, 468 U.S. 85 (1984) (applying rule of reason to limitation on football game broadcasts); *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447 (1986) (applying rule of reason to dental association rule prohibiting members from submitting x-rays to insurers); *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679 (1978) (applying rule of reason to professional association's restriction on competitive bidding by its members).

[2] As shown in our petition (at 13-15), the same is true of the court of appeals decisions on which respondents rely. Each applied the rule of reason. None required the kind of proof of "necessity" required by the Ninth Circuit here. The only exception is the Ninth Circuit's own decision in *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133 (9th Cir.), *cert. denied*, 540 U.S. 940 (2003). But even there, the basis for decision was not that the particular price was unnecessary but that the venturers were jointly setting the price of their own separate "support services," not the output of the venture itself. *Id.* at 1151.

gasoline, Equilon had to set some price for that gasoline. As the United States correctly observes, "[p]ricing decisions are a core function of any production joint venture." U.S. Br. 18 n.18. That should be the end of the analysis. A joint venture or its owners should not have to defend how the venture's products are priced to avoid antitrust liability. The venture was lawful—it must price its products. The exact price it sets is irrelevant, and the exact price certainly need not be "integral" or "necessary" to avoid *per se* condemnation.

Indeed, this case presents an even stronger circumstance for rejecting the *per se* rule than the cases respondents cite. In each of those cases, the participants in the venture remained competitors in the relevant market, raising the possibility that the restraints they adopted in connection with their venture could affect the competition between them. No such possibility exists here. As the United States correctly observes, "Equilon's formation eliminated *all* price and non-price competition, in any sense relevant to Section 1, between the two brands of gasoline in the western United States. That fact remained true, regardless of how Equilon (or petitioners as Equilon's owners) priced the two brands." U.S. Br. 11. Thus, there is no issue here of a price-fixing agreement between companies regarding a product as to which they were in competition. Rather, the issue is whether, having formed a joint venture that validly ended competition between them, it can be *per se* illegal for them to set the selling price of that venture's own product.

It cannot, and indeed, the price that a legitimate joint venture charges for the venture's output should not be subject to attack at all under Section 1 of the Sherman Act. It should not matter whether the venture set the price, or the venture's owners set the price, nor whether the decision about how to price the venture output was made in the negotiations leading up to the venture or after the venture was formed. Whenever and however the decision was made, it was a decision to price the output of a legitimate joint

venture and, like any other business decision of a single entity, cannot be subject to attack as an illegal agreement.

The United States confirms the vital need for this Court to review the Ninth Circuit's decision. As the United States observes, joint ventures such as Equilon are "increasingly common and often have substantial procompetitive potential." U.S. Br. 17. The Ninth Circuit's ruling thus "casts a shadow over the critical decisions of numerous businesses to the detriment of the national economy" and thereby "chills legitimate and beneficial economic activity." *Id.* Certiorari should be granted to remove that shadow.

Respectfully submitted,

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